IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3956 OF 1997

Rocky Wilson Pereira ..Petitioner.

V/s.

Sugandha Krishna Patil ..Respondent.

WITH
WRIT PETITION NO. 3955 OF 1997

Rocky Wilson Pereira ..Petitioner.

V/s.

Sindhutai P. Pawar ..Respondent.

WITH
WRIT PETITION NO.3954 OF 1997

Rocky Wilson Pereira ..Petitioner.

V/s.

Madhuri Arun Shinde ..Respondent.

Shri S.D.Mogre for petitioner.

CORAM : R.V.MORE J.

DATED : 26TH JUNE, 2007.

P.C.:-

1. The above writ petitions filed under Article 227 of the Constitution of India takes exception to the common order dated 23rd July, 1997 passed by the Learned Judge of the City Civil Court, Mumbai, in Notice of Motion Nos.2304/1997, 2302/1997 and 2297/1997

thereby alleged exparte decrees passed in Short Cause Suit Nos.5246/1994, 5247/1994 and 5249/1994 are set aside and Notice of Motion made absolute.

2. Since in all the aforesaid suits are filed by the one and the same person against different defendants/respondents and the facts of all the suits being similar and the Notices of Motion came to be disposed off by the common order, I proposed to dispose of these writ petitions by this common order.

3. The petitioner filed abovesaid suits on 28th August, 1994 against the respondents for recovery of possession alleging that the respondents are trespasser over the suit premises and also for declaration of his ownership and further declaration that the respondents are the trespasser.

4. The petitioner with the help of process server tried to serve writ of summons to respondents / defendants. However, the writ of summons could not be served on 31.1.1995. The petitioner made second attempt on 3.2.1995 to serve the writ of summons on the respondents/ defendants but could not succeed. The petitioner made third attempt on 4th February, 1995, this time also he could not succeed. It is the case of

the petitioner that he tried to serve writ of summons on respondents thrice, but every time the respondents/ defendants houses were found locked. The contention of the petitioner was that the respondents/defendants already learnt about the filing of the suit and, therefore, trying to avoid the service of summons.

5. On 15th February, 1995 the petitioner / plaintiff and the process server made an affidavit that despite their diligent attempts the respondents/ defendants could not be served and in fact they are avoiding service of summons. The Court thereafter considered this affidavit of the plaintiffs and process server and recorded satisfaction that the petitioner / plaintiff had made out case for an order under order 5, rule 20 of Code of Civil Procedure for substituted service and such substituted service was ordered to be effected by pasting at the last known address of the respondents/defendants and in the conspicuous part of the Court. In addition to this the summons were also ordered to be sent by certificate of posting by the office of the court. There is no dispute and this procedure was completed. However, the respondents / defendants failed to appear before the court. The court ordered the suits to proceed exparte against respondents / defendants and ultimately on 15th March,

1997 the suits came to be decreed ex-parte.

6. The petitioner thereafter took out proceeding for execution of the aforesaid decree and ex-parte decrees came to be executed as far as respondents / defendants in these petition are concerned. The respondents / defendants were dispossessed and the possession of the suit premises were handed over to the petitioner. Only after the execution of the decrees, the respondents/defendants rushed to the court on 7th May, 1997 for setting aside the ex-parte decree.

7. The learned Judge of City Civil Court, Mumbai after hearing both the side was pleased to set aside ex-parte decrees, mentioned above by his common order dated 8.7.1997, which orders are impugned in the present petitions.

8. Mr.Mogre, learned counsel for the petitioner submitted that the petitioner has already created third party interest in the suit property. He also pointed out that several attempts were made to serve respondents/defendants, however they could not be served. He submitted that in fact the defendants were deliberately avoiding the service of summons and,

therefore, he and process server filed affidavit on 15th February, 1995. The court after being satisfied rightly passed order for substituted service. He also submitted that the contents of affidavit dated 15th February, 1995 are not specifically challenged by the defendants, therefore, the court should not go beyond the order of substituted service. He also submitted that in accordance with order of substituted service summons were pasted on the doors of houses of the respondents/defendants. The summons were also sent by certificate of posting. He also submitted that the third parties who are in possession of the suit premises were not before the lower court. He lastly pointed out that the decree was not passed under order 13 rule 9 of Code of Civil Procedure, same cannot be said to be ex-parte and, therefore, the application for setting aside ex-parte decree is not maintainable.

9. The aforesaid writ petitions came to be admitted on 29/08/1997 and interim relief in terms of prayer clause (b) was already granted thereby staying further proceeding in the respective Short Cause Suits.

10. After giving anxious thoughts to the submission made by the learned counsel Shri.Mogre and after going through the documents on record, I am of

considered view that the impugned orders deserve to be quashed and set aside. In my opinion, the learned Judge of the City Civil Court committed error in setting aside ex-parte decree.

11. The learned Judge in the City Civil Court, Mumbai relied upon full bench Judgment of Andhra Pradesh High Court in "G.Shanmukhi V/s. U.Venkatramani Reddi" reported in AIR 1947 AP 1 (FB) and came to the conclusion that if the respondents/defendants are able to show that the order permitting substituted service passed on insufficient material, then further procedure followed to effect substituted service will have no effect on the case. Thus, the learned Judge proceeded on the footing that if the respondents/defendants succeeded in showing that the order of substituted service is illegal or wrong, then ex-parte decree required to be set aside. The learned Judge ultimately came to conclusion that the order permitting substituted service cannot be sustained and consequently passed the impugned order.

12. I have gone through the reasons given by the learned Judge. In my opinions the reasons given by the learned Judge of City Civil Court are not sufficient to come to the conclusion that order of substitute service

is bad in law.

13. Firstly, the order of substitute service is never challenged independently or separately by the respondents. Secondly, the respondents/ defendants did not challenge the affidavit dated 15.2.1995 of the plaintiff and process server. The process server had affirmed in his affidavit that he visited the respondent/defendants houses on 27/01/1995, 03/02/1995 and 04/02/1995 and on all three occasions, he found the doors locked. He specifically stated in the affidavit that on enquiry with the neighbours he learned that the respondents/defendants had no fixed time to come to their houses. It was stated that the respondent/ defendants are avoiding the service of summons. What is important that the respondents/ defendants have not challenged the averments at all made in this affidavit. It is not the case of the respondent that the process server did not come to serve the summons on the aforesaid dates. The learned Judge without any basis disbelieved the statement of the process server made in the affidavit that on all the three occasions he visited the houses of the respondents/ defendants and he found doors locked. The learned Judge ignored factual position that the respondents have neither challenged the order of substituted service nor

disputed the affidavit of process server dated 15th February, 1995. The learned Judge also failed to take into consideration that it is not the case of the respondents/ defendants that the process server did not come to serve the summons on the aforesaid dates. The learned Judge ignores the aforesaid lacuna on the part of respondents/ defendants by saying that it is ignorance of their advocates. The learned Judge concluded that when the defendants says that they had no occasions to receive the summons, it means there was no attempt to serve of summons. In my considered view the entire approach of the learned Judge is erroneous. The learned Judge, in my opinion, could not have disbelieved the process server/bailiff without there being material to justify his disbelief. I have gone through the documents on record and there is nothing which can justify the disbelief expressed by the learned Judge, especially when it was not even the case of the respondents/ defendants that process server / bailiff did not visit their houses on the aforesaid date. Thirdly, the learned Judge lost sight of the presumption under section 35 and 114 illustrate (e)(f) of the Evidence Act that the Judicial & Official acts have been regularly performed. In my opinion, in the absence of any material to disbelieve the process servers affidavit, the learned Judge could not have

found fault with the order of substituted service. The failure on the part of respondent to challenge the averment in the affidavit of the plaintiff and process server dated 15th February, 1995 also goes to the root of the matter. In the absence of specific challenge, in my opinion, the learned Judge could not have held that the order of substituted service is bad in law.

14. The only reason given by the learned trial court to set aside ex-parte decree being order of substituted service is bad and having held that the learned Judge could not have faulted the order of substituted service. I have no alternate but to interfere in the impugned order.

15. The impugned order deserves to be quashed and set aside on the ground that the decrees passed in petitioner's favour was on merits under order VIII, Rule 10 of Civil Procedure Code and therefore application under order IX Rule 13 for setting aside exparte decree was not maintainable. Shri Mogre appearing for the petitioner in this regard relied upon Division Bench Judgment reported in Dhanwantrai R.Joshi & Ors V/s. Satish J.Dave & Ors., reported in 1999 (1) Bom.C.R., 1997. The Division Bench considered the provisions of order VIII, Rule 5 and 10 and order IX

Rule 13 of Civil Procedure Code and held that the decree drawn for want of written statement in spite of time having been given cannot be set aside by application under order IX rule 13 as there is no provision under order VIII to set aside such decree by an application. In my opinion in the present case in spite of due service the respondents/ defendants failed to file written statement and, therefore, while decreeing the suit the learned Judge exercised his power under order VIII Rule 5 and 10 of Code of Civil Procedure. In my view the decree is passed under order VIII rule 5 and 10. Consequently, the application under order IX Rule 13 of Code of Civil Procedure is not maintainable. In the result, I pass the following order:

i. All the three writ petitions are allowed in terms of prayer Claus (a).

ii. Impugned orders dated 8th July, 1995 are set aside with no order as to costs.

iii. The writ petition stands disposed of.

(R.V.MORE, J.)